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Supreme Court, U.S.
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No. 96-1524

In The

Supreme Court of the United States

October Term, 1996

JACK GROOMS, *et al.*,

Petitioners,

vs.

GETTYS GLAZE, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of the State of South Carolina

RESPONDENTS' BRIEF IN OPPOSITION

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RESTATEMENT OF QUESTION PRESENTED

Does the South Carolina judiciary have the authority to nullify a municipal charter when the charter was issued in contravention of law?

LIST OF INTERESTED PARTIES

The Respondents Gettys Glaze, Robert B. Kizer, Catherine E. White and the City of Charleston, a Municipal Corporation, join in this brief in opposition to the Petition. Robert G. Clawson, Jr., is counsel of record for these Respondents.

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APPENDIX

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STATEMENT OF JURISDICTION

Respectfully, this Court cannot properly exercise jurisdiction pursuant to 28 U.S.C. § 1257(a), because the questions now posed by Petitioners were not presented to the South Carolina courts. New questions cannot now be considered.

Reliance on Article 1, Sec. 10 of the United States Constitution is misplaced. This case concerns the judicial construction of a state statute. It does not involve the enactment of legislation.

These Petitioners lack standing to prosecute the issues they attempt to raise.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

Unitd States Constitution, Art. I, Sec. 10

S.C. Code Ann., Sec. 5-1-110

S.C. Code Ann., Sec. 5-15-130

Supreme Court Rule 14

Rule 15, South Carolina Rules of Civil Procedure

Rule 59(e), South Carolina Rules of Civil Procedure

STATEMENT OF CASE

Respondents respectfully oppose the Petition of Certiorari.

A. Course Of Proceedings And Disposition Of The Case Below.

This case concerns an attempt to form a municipality under the laws of South Carolina. The incorporation effort was challenged by the Respondents on the ground that the proposed town was not geographically contiguous as required by state law.

The area sought to be incorporated consisted of nine (9) separate and distinct parcels of land surrounded by areas of water, marsh or lowland within the corporate limits of the cities of Charleston and Folly Beach, South Carolina.

The Respondents commenced an action challenging the incorporation effort pursuant to S.C. Code Ann., Sec. 5-1-110. The contest to the incorporation was pending, and duly noticed to the Petitioners, prior to the issuance of any charter, prior to any election of municipal officers, prior to the activation of any municipal charter, prior to the exercise of any franchise rights under the auspicious of the town and prior to any contracts being awarded by the town.

The Respondents' effort to enjoin the election of municipal officers, and the activation of the charter of the town upon their election, pending a merits hearing was unsuccessful, as the South Carolina Supreme Court superseded a temporary injunction issued by the trial court.

After a hearing on the merits, the trial court, on September 28, 1995, ruled the town a nullity, declaring it lacked geographical contiguity required by state law. The trial court enjoined the town from operating as a municipality and issued a limited stay of injunction pending appeal, conditioned on the town taking only such action in the normal course and scope of

that required for its safe and efficient operation. Petitioners did not move to alter or amend the ruling of the trial court pursuant to Rule 59(e) SCRCP. The Petitioners' attempt to supersede the limited stay of injunction pending appeal was denied by the South Carolina Supreme Court. On November 18, 1996, the South Carolina Supreme Court affirmed the ruling of the trial court. *Glaze v. Grooms*, 478 S.E. 2d 841 (S.C. 1996). Post appeal, the Petitioners' motions for a rehearing, a remand, and a stay were denied, on December 20, 1996. The Petitioners did not request a stay to allow them to petition the United States Supreme Court for a writ of certiorari.

The town having been declared a nullity, its geographic area reverted to an unincorporated status, under the jurisdiction of Charleston County, South Carolina. The Comptroller of Charleston County has been appointed Receiver for the town, with power to continue to completion contracts for public improvements or other town obligations. The Receiver is now formulating a plan, for court approval, to wind up the affairs of the town.

B. Correction Of Misstatements In Petition.

Throughout their Statement of the Case, the Petitioners make reference to the conduct of elections, which were not appealed. These references are true, but are irrelevant and misleading. A contest to an election in South Carolina is directed to the manner in which the election was conducted and can only be brought by a candidate. S.C. Code Ann., Sec. 5-15-130. S.C. Code Ann., Sec. 5-1-110 mandates the procedure in which an incorporation must be challenged, a procedure the Respondents followed.

The Petitioners argue that the state court concluded that "any crossing of a waterway necessarily occupied the entire

waterway". (Petition, p. 14). This is not so. Uncontroverted evidence was introduced at trial that every inch of water, marsh and lowland lying between the nine (9) separated areas of the town were included within the corporate limits of other municipalities.[1]

The trial court did not stay its order pending appeal. The trial court issued an injunction, but granted a limited stay only to allow the town to perform essential services pending appeal.[2]

SUMMARY OF ARGUMENT

This was a case of statutory construction of the incorporation statute. Petitioners rely on Article I, Sec. 10 of the United States Constitution as the basis for a federal right to form and, thereafter, maintain a town regardless of state law requirements. The Petition should be dismissed for want of jurisdiction. No federal issues were ever raised in the state proceedings by the Petitioners, and Article I, Sec. 10 has no application to a judicial decision.

Additionally, the creation of a political subdivision creates no contract between it or its inhabitants with the state. The Petitioners have no standing to pursue an action based on a nonexistent contract.

The Petition should be dismissed for the further reason that the court ruling impaired no contracts. South Carolina law provides a means of protecting contractual obligations of dissolved public entities, and a plan for winding up the affairs

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1. Record on Appeal, pp. R-287-316; Plaintiff's Exhibits 1, 4, 4A, 5A, 5C, 7, 8, 9, 10, 11, 12, 13 and 20.

2. Record on Appeal, p. R-47.

of the town is underway. Due process does not accord Petitioners a federal right to the continued existence of a political subdivision not created in accordance with law.

Further, the only impairment of contract issue raised in the state courts was the allegation that the Town had "employees under contract".[3] The Petitioners, none of whom were employees, lack standing to raise that issue.

The Petition should also be dismissed because the State of South Carolina has a compelling interest in the formation of its political subdivisions, and its determination that such entities be geographically contiguous does not abridge any federal constitutional provision.

REASONS FOR DENYING THE WRIT

I.

THIS COURT HAS NO JURISDICTION TO CONSIDER PETITIONERS' ARGUMENTS.

A. This Court will not review judgments rendered by the highest court of a state, unless a federal issue has been raised and decided in the state proceeding. *Yee v. City of Escondiado,* 503 U.S. 519 (1992). South Carolina law is in accord. Issues not raised and not ruled upon at trial cannot be raised on appeal. *Schofield v. Richland County School District,* 316 S.C. 78, 447 S.E. 2d 189 (1994). The Petitioners' argument that, although not mentioned, federal questions were necessarily decided in the state proceedings is novel, but specious.

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3. Record on Appeal, Answer of Town of James Island, Par. 26, p. R-149; Answer of Election Commissioners, Par. 26, p. R-142.

The Petitioners raised no federal issues in their responsive pleadings or at any time during the state proceedings. Petitioners have not, and cannot, specify any stage of proceedings where federal issues were raised, the method or manner in which they were raised, or the way in which they were passed upon, as required by Sup. Ct. R. 14(g)(i). The Petitioners cannot comply with Sup. Ct. R. 14 for the simple reason that they never presented or argued any federal issues to the state courts. The issue of employees under contract was neither argued to nor passed upon by the state courts.[4]

The Petitioners had ample opportunity to raise and preserve federal issues, if any. The law of South Carolina allows for the liberal amendment of pleadings, and requires such, if the merits of the action will be subserved. Rule 15, SCRCP. State rules of practice further accord a means of preserving issues not ruled upon by the trial court for appellate review. Rule 59(e), SCRCP. Since the Petitioners did not avail themselves of these preogatives during the state proceedings, they cannot do so now.

B. At issue in this case is a judicial interpretation of a statute under which a municipal incorporation was attempted. The South Carolina Supreme Court simply interpreted the law in effect at the time of incorporation. The prohibition of Article I, Sec. 10 of the Constitution is directed to the enactment of laws, not their judicial construction. *Ross v. Oregon*, 227 U.S. 150 (1913).

Contrary to Petitioners' assertion, the decision of the South Carolina Supreme Court imposed no "new" requirement for municipal incorporation under South Carolina law. South Carolina precedent requires a municipality to be geographically contiguous, and this requirement has been implied when not

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4. Counsel for Petitioners were not counsel of record until after the decision of the South Carolina Supreme Court.

expressly stated in a statute. *Tovey v. City of Charleston*, 237 S.C. 475, 117 S.E. 2d 872 (1961). South Carolina precedent also prohibits portions of one municipality being made a part of another, absent adherence to specific statutory procedure. *Town of Forest Acres v. Siegler*, 224 S.C. 166, 77 S.E. 2d 900 (1953).

Petitioners' position that a court must not apply an interpretation of its incorporation statutes to the case at hand, but rather must apply it in the next case, indicates a fundamental misunderstanding of the doctrine of common law.

Even should geographical contiguity be deemed a "new" requirement for municipal incorporation, a change in interpretation of a law by a state court does not constitute the passage of a law in contravention of Article 1, Section 10 of the United States Constitution. *Fleming v. Fleming*, 264 U.S. 29 (1924); *Tidal Oil Company, et al. v. Flanagan*, 263 U.S. 444 (1924).

C. The protection of Article 1, Section 10 of the United States Constitution is for those whose contracts are impaired by legislative action. This case does not involve legislative action. Moreover, Petitioners have no contracts that have been impaired. The creation of a political subdivision, even when lawfully formed, creates no contract between it or its inhabitants and the state. *Hunter v. Pittsburgh*, 207 U.S. 161 (1907). Here, the creation of the town was found to have been unlawful, and a nullity. Thus, notwithstanding *Hunter*, there was no "contract" ever in existence. As previously stated, no such issues were presented to the state courts, and Petitioners lack standing to assert them here.

II.

THE RULING OF THE SOUTH CAROLINA SUPREME COURT HAS IMPAIRED NO CONTRACTS NOR VIOLATED ANY PRINCIPLES OF DUE PROCESS.

To the extent the Petitioners attempt to claim the effect of the state court ruling impaired contracts between the town and third parties, this claim must be disregarded. The Petitioners are not parties to any such contracts, and they have no standing to allege a constitutional violation on behalf of a stranger.

The nullification of the town has not resulted in any contracts being impaired. Under South Carolina law, upon dissolution of a public entity, the obligations of that entity become the responsibility of the entity which assumes its assets. *Walker v. Bennett,* 118 S.E. 779 (1923). Further, any such contracts are now in the hands of a receiver acting under authority of a state court, and any constitutional rights of third parties can be asserted in that forum.

Petitioners raise by implication an alleged violation of due process resulting from the court's ruling due to contracts being impaired ". . . which are the direct product of cherished First Amendment voting and speech rights". (Petition, at page 6). This claim is specious. This Court has recognized that municipal incorporation is purely a matter of state concern.

> . . . Municipal corporations are political subdivisions of the State, created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them . . . The number, nature and duration of the powers conferred upon these corporations and the territory over

> which they shall be exercised rests in the absolute discretion of the State. Neither their charters, nor any law conferring governmental power . . . constitutes a contract with the State within the meaning of the Federal Constitution. The State, therefore, at its pleasure may modify or withdraw all such powers, may take without compensation such property, hold in itself, or vest it in other agencies, expand or contract the territorial area, unite the whole or part of it of another municipality, repeal the charter and destroy the corporation. All of this may be done conditionally or unconditionally, with or without the consent of the citizens, or even against their protest. In all these respects, the State is supreme, and its legislative body, conforming its action to the state constitution, may do it as it will, unrestrained by any provision of the Constitution of the United States. Although the inhabitants and property owners may suffer inconvenience . . . they have no right by contract or otherwise in the unaltered or continued existence of the corporation or its powers and there is nothing in the Federal Constitution which protects them from these injurious consequences.

Hunter v. Pittsburgh, 207 U.S. 161, at 178, 179.

Petitioners' naked assertion in their Petition, at pages 21 and 22, that "South Carolina having permitted the municipality to elect officers, and thereby to become empowered, the state could not retroactively abridge those rights", flies in the face of *Hunter*.

The State of South Carolina has established requirements for municipal incorporation. Among those requirements is geographical contiguity. The requirement of contiguity does not run afoul of any federal constitutional provision, and Petitioners do not contend that it does. Petitioners are merely frustrated because of their inability to comply with state law, and seek to make a federal case out of a matter purely of state concern.

The Petitioners simply have no federally protected interest in the continuation of the town, and no federally protected interest to assemble, vote or otherwise speak in an illegally formed town.

The cases cited by Petitioners to support their position have no factual or legal bearing here. *Allied Structural Steel v. Spannaus*, 438 U.S. 234 (1978), involved the retroactive application of a subsequently enacted law to a preexisting contract. This case does not involve the enactment of a law, or any retroactive application of a law. In this case, the South Carolina courts construed the statutory and common law in effect when the offending conduct was undertaken.

Gomillion v. Lightfoot, 364 U.S. 339 (1960) presented a challenge to a legislative act, not a judicial decision. *Gomillion* held that state laws, even in areas where the state is supreme, must yield to federal constitutional requirements. There is no federally protected right to live in a non-contiguous town, based on Article I, Sec. 10 of the Constitution, or otherwise. Indeed, in *Gomillion*, this Court acknowledged that ". . . no constitutionally protected contractual obligation arises between a state and its governmental entities solely as a result of their relationship". 346 U.S. at 343.

Bouie v. City of Columbia, 378 U.S. 347 (1964) is similarly inapposite. *Bouie* held that an unforeseeable enlargement of a

criminal statute by judicial construction violates the due process clause of the Fourteenth Amendment. This is neither a criminal case, nor a case based on the Fourteenth Amendment. Even if it were, given longstanding state precedent, the Petitioners cannot reasonably claim surprise or an unforeseeable construction of the statute at issue. *Tovey v. City of Charleston, supra.*

III.

THE STATE OF SOUTH CAROLINA HAS A COMPELLING INTEREST IN HOW ITS POLITICAL SUBDIVISIONS ARE FORMED.

It is evident that the State of South Carolina has a singular and compelling interest in establishing public policy for how its political subdivisions are formed. *Hunter v. Pittsburgh, supra.* The federal judiciary has been loathe to interfere with a state in the administration of its own affairs.

The law of South Carolina is that cities must be geographically contiguous. Petitioners raise no federal claims inherent to this requirement; rather, their alleged claims stem solely from their frustration with the fact of this requirement.

CONCLUSION

The Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX A — RELEVANT CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

S.C. Code Ann., Sec. 5-1-110 provides, in pertinent part:

> Any suit to challenge the incorporation procedures of any municipality . . . shall be brought within sixty days after the issuance of a certificate of incorporation.

S.C. Code Ann., Sec. 5-15-150 provides, in pertinent part:

> Within forty-eight hours after the closing of the polls, any candidate may contest the result of the election . . .

Rule 15, South Carolina Rules of Civil Procedure provides, in pertinent part:

> (a) . . . a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires and does not prejudice any other party . . .
>
> (b) When issues not raised by the pleadings are tried by express or implied consent . . . they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment;. . . . If evidence is objected to at the trial on the ground that it

> is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby. . . .

Rule 59(e), South Carolina Rules of Civil Procedure provides:

> (e) A motion to alter or amend the judgment shall be served not later than ten (10) days after receipt of written notice of the entry of the order.